Supreme Court, U.S
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No. 08-562

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In the
Supreme Court of the United States

WILLIAM MALIHA,

Petitioner,

– v. –

FRANK FALUOTICO and SARA G. MALIHA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE SUBJECTIVE INTENT OF A POLICE OFFICER MAY BE ADMISSIBLE IN DEMONSTRATING THAT HE HAS FABRICATED AN OBJECTIVE BASIS FOR AN ARREST?

2. WHETHER IN LIGHT OF SUBSTANTIAL EVIDENCE OF SUCH PERSONAL ANIMOSITY AND THE DUBIOUS VERACITY OF THE REPORTING VICTIM, WHICH COULD NOT BE DETERMINED ON SUCH A MOTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT?

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OPINIONS BELOW

The district court's opinion granting respondents' motions for summary judgment was filed on February 28, 2007 and is reported at 2007 U.S. Dis. LEXIS 13602. The Court of Appeals' decision affirming the district court's decision was rendered on June 20, 2008 and is reported at 2008 U.S. App. LEXIS 13097. The Court of Appeals' order denying rehearing or rehearing **en banc** was issued on August 20, 2008 and the mandate issued on August 29, 2008.

JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1) as the order of the Court of Appeals for the Second Circuit was entered as a mandate on August 29, 2008 and is final.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution shields citizens from false arrest.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

After discovery was completed, respondents moved successfully for summary judgment. The district court held that Faluotico had probable cause to trigger petitioner's arrest and held that "it was entirely proper for Faluotico to rely on trustworthy statements from a witness to determine whether probable cause existed." Judge Kahn further wrote, "In this instance, there was **every reason to credit the allegations as the apparent victim, respondent Maliha, recounted these facts soon after she fled the scene in fear, going to her neighbor's house.**" [SA-8]. (Emphasis added).

Judge Kahn rejected Faluotico's argument that "Judge Work's decision finding that petitioner committed harassment in the second degree requires the Court to find that probable cause existed and dismiss Petitioner's claim for false arrest." [SA-8-9].[1] The court held that "it would stretch the test [of preclusion] to conclude that Judge Work's conclusion was actually and necessarily decided and reviewed by the appellate court such that it should bind the Court." [SA-9].[2]

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[1] In fact, the Family Court found that Sara Maliha had punched her husband in the face and never concluded that Dr. Maliha had assaulted her.

[2] Respondents filed no notice of cross-appeal with regard to this or any other issue. The Appellate Division for the Third Department found that no family offense had been adjudicated below and did not review this issue.

The district court also rejected petitioner's substantive due process claim, since, his Honor found that it "directly arises from Respondents' actions that allegedly deprived him of liberty" and "is more properly characterized as a false arrest claim and not a substantive due process violation." Finding that "the Fourth Amendment provides the constitutional foundation for such claims," Judge Kahn dismissed it, citing *Albright v. Oliver*, 510 U.S. 266 (1994). [SA-10]. Judge Kahn declined to address any of the other arguments Faluotico made below.

Having dismissed petitioner's claim against Faluotico, the district court held that "there is no constitutional violation under which Petitioner can sustain an action against grievant Maliha under sec. 1983." [SA-11]. The district court held that Faluotico's subjective intent was irrelevant, that the police agency had the right to arrest petitioner based upon Sara Maliha's willingness to sign a supporting deposition regardless of its inconsistency with her initial statement to the reporting deputy sheriff and Faluotico's lack of any investigation into what had occurred. Indeed, the district court denied that Faluotico had **any** obligation to investigate the truthfulness of Sara Maliha's revised account of events and could exercise his own subjective hostility toward petitioner, however blatant, so long as Sara Maliha was prepared to swear out a supporting deposition.

On appeal, the Second Circuit affirmed, holding that no material disputed facts existed and that Faluotico's intense and expressed hostility toward Dr. Maliha could not be used to call into question the **bona fides** of his conduct. Indeed, according to the

Second Circuit, the only relevant issue on the false arrest claim was whether Faluotico had an "objective basis" to direct petitioner's arrest and Sara Maliha's supporting deposition provided this.

STATEMENT OF FACTS

The Second Circuit has affirmed the improvident use of summary judgment, denying Dr. William Maliha a jury trial on his claim that a police detective, Frank Faluotico, ordered his arrest and caused his prosecution without probable cause and maliciously.

Taking the facts most favorably to petitioner, for purposes of the Rule 56 motion:

On June 19, 2002, Sara Maliha, then petitioner's wife, grabbed a chain from around his neck during a domestic dispute. She punched him in the face and he attempted to calm her by backing her across the kitchen, controlling the hands she had used to strike him.

After leaving the family residence, Sara Maliha went to the home of a close friend, Ina Liffman. Mrs. Liffman called 911. Upon arrival, a sworn deputy sheriff, John Sperath, interviewed Mrs. Maliha, observed and recorded that she had no physical injuries, did not need or want medical attention and wanted no further police involvement. Sperath then departed the Liffman residence with the intent to find petitioner and better understand what had occurred.

Mrs. Liffman then called respondent, Frank Faluotico, a detective with the Sheriff's Office.[3] She and Mrs. Maliha advised Faluotico of the domestic incident on the phone. There is no evidence that, during this phone call, Mrs. Maliha sought the arrest or incarceration of her husband. Faluotico then began a series of actions which form the basis for this suit.

Based upon his subjective hostility toward the petitioner, not the underlying facts of this case, and substantially embroidering his meager current tense knowledge of petitioner, Faluotico began an avid campaign of misrepresentation aimed at getting his superiors to order petitioner's arrest.

After deputy sheriff Sperath reported to the desk sergeant, Greg VanKleek, that petitioner and his wife had had an argument, Sgt. VanKleek reported to his captain, "There was nothing physical that I know of. Nobody was hurt or anything."[4] Sperath also

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[3] At the time of these events, Faluotico was the former long-time paramour of a presiding appellate division Judge, Karen Peters, who herself remained close friends with the Liffmans and Sara Maliha. Faluotico had himself been enmeshed socially with Sara Maliha and the petitioner several years before the events in question.

[4] Petitioner filed a FOIL request for tape recordings of conversations between and amongst members of the Ulster County Sheriff's Department relating to his arrest. According to Faluotico, who heard the tape recordings after petitioner produced them during discovery, they were created by the Ulster County Sheriff's Department and maintained in its ordinary course of business. Faluotico assumed these conversations would be taped. These have been transcribed and certified by a court reporter and were provided to the district court. The distinct conversations reported in the transcript are

reported that he had no basis to arrest petitioner as Dr. Maliha had committed no assault and caused no injury. Moreover, he reported, Sara Maliha did not wish to press charges. After making this report to his sergeant, Sperath proceeded to petitioner's home to discuss what had occurred with him. When Sperath arrived, petitioner was not at his residence.

Faluotico's Involvement Caused Petitioner's Arrest

From the Liffmans' home, Sara Maliha spoke with Faluotico, who was at his home the evening of June 19, 2002, for five to ten minutes. Deputy Sheriff Sperath had already come and gone and Faluotico knew this. **By his own admission, Faluotico did not get involved in the investigation of the incident on the evening of June 19 and never spoke with petitioner about what had occurred.**

After Sara Maliha had denied that she had been assaulted when questioned by Sperath, Faluotico intervened with his superiors, advocating for petitioner's arrest, arraignment, the entry of an order of protection against him and the seizure of weapons which petitioner had previously inherited and/or purchased and retained at the marital residence.

The transcript of conversations shows the following:

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numbered. The above excerpt is from the second conversation, between Sgt. VanKleek and his Captain.

Deputy Sheriff John Sperath responded to the scene of the Liffman home and spoke with Sara Maliha. He reported to Sgt. VanKleek that he had spoken with Sara and when asked, "Has somebody been assaulted or not?," he responded "No, there's no charge." VanKleek directed Sperath to speak with Dr. Maliha to get his side of the story.

Faluotico then called into the Sheriff's Department and asked to talk with VanKleek who he wanted to "oversee this whole thing". VanKleek reported to Faluotico that Captain VanVliet had directed him to have deputy sheriff Eric Benjamin get petitioner's badge and ID.[5] This did not satisfy Faluotico, who replied, "*But that's not the problem ... Let me tell you. This guy has been losing it, as of late.*" (Emphasis added). Faluotico continued, "He's got an arsenal the size of ..."

VanKleek interrupted and told Faluotico that he had already told Mrs. Maliha that "it's nothing physical or no criminal charges at this point." Faluotico responded, "Oh, yes there are." VanKleek then asked, "Oh, there are?" Faluotico then protested, "That's where Sperath is fucking dropping the ball." *Id.* Faluotico then stated, "That's why I'm calling you."

Faluotico then commenced his exaggerations and false statements: he told VanKleek, "He grabbed her and was *slamming her against the wall in front of the child.*" (Emphasis added). Faluotico stated, "That is the criminal charge." VanKleek then challenged

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[5] Faluotico knew this had occurred because he is the person who called "the boss," who, in turn, called Capt. VanVliet and informed him of the incident in the first place.

him, "that's what she's saying or we have proof of that, marks and everything else, or is that just her word?" Faluotico then vouched for his co-respondent. "That's what she's saying and she's very believable." Faluotico then told the sergeant to have someone go up because Sara Maliha was now willing to sign a complaint. Faluotico told the sergeant to get a *criminal complaint* to support an order of protection.

Faluotico went further, telling the sergeant, "In my heart, I feel he's dangerous right now." He then cautioned VanKleek not to send Sperath to petitioner's house alone, "because ... when he [Dr. Maliha] knows he's outnumbered, he turns into a bug. And ... I don't want to see a fucking open fire situation here."[6]

Faluotico then told the sergeant that he had known Sara Maliha "for years" and "this isn't the first time. This is only the first time that it's gotten this bad that she had to call the police."[7]

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[6] At deposition, Faluotico claimed that he told the captain that Maliha was like "a bug when cornered" because petitioner "became very irrational to deal with when you cornered him in a situation, yeah, from when we had been at social gatherings." Predictably, Faluotico could not remember any specific situation when he had seen Maliha so behave.

[7] At his deposition, Faluotico testified to the contrary: that he had NO information that night that there had ever been any prior incidents of domestic violence perpetrated by Dr. Maliha, that he was "shocked" to hear it had happened and that no one he and the Malihas mutually knew had ever made any comment to him which suggested any such abusiveness. Indeed, as of that date, he knew nothing about the state of the Maliha marriage.

Faluotico then admitted that Sara had "no physical injuries" and that petitioner could not be charged with an assault, only "harassment second." Faluotico then again exaggerated, claiming that petitioner had "thrown" Sara Maliha "to the wall".

In the same conversation with VanKleek, Faluotico explained to the sergeant why his captain had called a few moments before and directed VanKleek to send Benjamin to get Maliha's badge and ID: "Yeah, because I talked to the boss already." Faluotico boasted, "That's why the Captain got called."[8] According to Faluotico, he called both the Sheriff and the Captain [VanVliet]. In his conversation with the Captain, he reported that he and Dr. Maliha "weren't friends" and "I just didn't think it was a stable situation with all the guns in the house ... because I had seen unfortunate circumstances where domestic situations have led to death, and I didn't want to see that here."

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[8] At his deposition, when asked who he spoke with from the sheriff's department on June 19, 2002, Faluotico mentioned Captain VanVliet, Sergeant VanKleek, but did not testify that he spoke with the "boss". Later, during the deposition, Faluotico stated that he had called Sheriff Bockelman directly about this incident because "he's in the chain of command" and he had a responsibility to notify all the members of his chain of command if a department member is involved in an incident. When pressed as to whether there was any requirement that *he* call the Sheriff about the incident, Faluotico claimed that he was to make a report to his chain of command. When asked whether his superior directed that he call the Sheriff, Faluotico evaded the question and finally claimed that he told himself to call the sheriff. Indeed, the first person in his chain of command he called was the Sheriff.

In the fourth recorded conversation provided to petitioner, VanKleek, Faluotico and deputy sheriff Eric Benjamin engaged in a three-way conversation.[9] Faluotico continued to exaggerate what had occurred at the Maliha residence: asserting that petitioner "kind of lost it," he then embellished, "[H]e was slamming her up against the wall, throwing her around, grabbing her ... they've been not talking for weeks now." Faluotico then warned Benjamin not to approach the Maliha residence by himself, "he's in that paranoid state. And he — as you well know, man, that boy's got a lot — lot of toys."

After hearing Faluotico's fabrications, Benjamin queried, "if she got slammed, that's mandatory arrest, right?" Faluotico responded in the affirmative. Later, Faluotico explained his actual conversation of earlier that evening with Sara Maliha: "She called me and says, What I am supposed to do? And I said, "well, what happened?" And she goes, "Well, he *grabbed me*." I said, "Did you tell our deputy that?" And, she goes, "Yeah." And I said, "And he didn't sign a Complaint." She goes, "Well, no, he's supposed to call back because he wants to talk to him first." I'm like, "if he can't find him, he's got to come back and take a complaint from you; *you're going to have to have him arrested.*" (Emphasis added). And she goes, "Okay." And I explained the process, and I said, "You know, you're *going to have to get something with the kid, too. I said, because he can just take that kid and go because*

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[9] Benjamin was a senior and experienced deputy sheriff.

she's as much his as she is yours and until you guys work this all out, you got to play by the rules." [Emphasis added].[10]

When Sgt. VanKleek re-entered the conversation, Faluotico began describing where petitioner allegedly kept his weapons, baselessly representing that Dr. Maliha recklessly scattered his weapons around his home.[11] Benjamin then challenged the basis for a mandatory arrest, reminding VanKleek that Deputy Sheriff Sperath had spoken with Sara Maliha and determined that petitioner's arrest was unwarranted.

VanKleek then indicated that, according to Faluotico, an arrest was mandatory. Benjamin continued to object, arguing that Maliha did not pose a threat to anyone: responding to Faluotico's attacks on petitioner, Benjamin stated, "Does that make him a threat to other people? Yeah. He can be an asshole ..." After this call, by radio, Sgt. VanKleek spoke with Sperath, "Now I'm hearing that ... he was throwing her up against the wall and stuff". Sperath replied, "she said he pushed her into a cabinet, a kitchen cabinet." VanKleek then responded, "Well, but — you know, if *you see some marks on the arms or whatever. I mean, I know, you weren't there."* [Emphasis added]. Sperath replied, "No, no marks,

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[10] At his deposition, Faluotico testified inconsistently about this initial conversation, claiming that Sara Maliha told him that she had "been grabbed, pushed up against the counter, she had marks on her arms and that he had harassed her."

[11] In fact, Faluotico knew that petitioner kept his weapons in a climate controlled and locked storage room. Faluotico never received any report of petitioner brandishing his weapons before or on June 19, 2002.

no marks."[12] VanKleek replied, "I understand. But, if she's adamant about pressing a charge." Sperath retorted, "She wasn't. That's the thing. That's why I didn't."

Sperath then called back VanKleek and reported that he had just spoken with Faluotico: "He's involved."[13] "Anyway, apparently Frank wants harassment second." VanKleek assented to that statement and Sperath continued, "He wants the guy's guns seized, an Order of Protection, and he wants him arraigned." VanKleek replied, "I know all that[,]" and then asked Sperath, "When you first interviewed her, she was not adamant at all about pressing any charges correct?" Sperath replied, "Absolutely not. I asked her." VanKleek then reported that he had told Faluotico this. He then asked Sperath whether he had seen any visible evidence that she had been assaulted. Sperath replied, "None whatsoever. I checked both her arms."[14]

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[12] Again, Faluotico contradicted this in his deposition, claiming that he questioned Sara as to whether she had been injured and she told him both that she had marks on her arms and had told the deputy that. During his phone conversations with his colleagues on June 19, 2002, Faluotico never claimed that Sara Maliha told him she had any marks on her arms.

[13] Faluotico conceded that he called Sperath directly that evening.

[14] This contradicts Faluotico's account of what he claimed in deposition his co-respondent told him — "she had marks on her arms." And, in his discussions with other sheriff department officials on June 19, 2002, Faluotico never claimed that Sara Maliha told him she had any marks on her arms.

VanKleek agreed that there was no basis for a harassment second, but directed Sperath to have Sara Maliha sign an information anyway. Sperath noted, "Frank was pretty, pretty adamant about having him arraigned." VanKleek replied, "I understand. I understand how adamant Frank was. I understand."[15]

VanKleek then called the captain back and made clear that he was working on getting petitioner's badge and ID. He also told his superior that Sperath was working on getting a signed information from Sara Maliha. He then remarked, "But whether we use that or not, that harassment second, we'll have a signed information. So if he comes out and he is a little buggy, we'll do him for that. We'll do the arraignment. We'll get the order of protection."

At the instance of Faluotico, Sgt. VanKleek directed Sperath to return to the Liffman home and have Sara Maliha sign an information justifying petitioner's arrest. Sperath protested that Dr. Maliha had not committed an arrestable offense and recounted that he had originally spoken with Sara Maliha, who had denied that she had been assaulted or injured and declined to press any charge against petitioner. Another participant in these discussions,

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[15] When asked whether he asked Sperath during this conversation why the deputy sheriff had not arrested petitioner, Faluotico could not recall the specifics of the conversation at all. Faluotico denied that Sperath told him that Sara Maliha denied injury when he interviewed her in person. When asked whether Sperath told him that Sara Maliha did not want to press charges, Faluotico could not recall.

Deputy Eric Benjamin, knew Dr. Maliha well and protested the spurious nature of Faluotico's assertions about him.

However, based upon Faluotico's intervention, Sgt. VanKleek ordered that his subordinate, Sperath, prepare an information for Sara Maliha's signature. She then signed a false instrument which materially exaggerated petitioner's conduct and falsely omitted her own initiation of force against her husband.

Shortly after 10:00 p.m., on June 19, 2002, at the instigation of the respondents, acting jointly, members of the Ulster County Sheriff's Department falsely arrested and detained Dr. Maliha. That evening, petitioner remained in the custody of state agents for between two and two and one-half hours and was arraigned on the violation of harassment second.

On June 20, 2002, again using his position as a state actor, Faluotico contacted the Family Court, County of Ulster for the purpose of pressuring the Chief Court clerk, with whom he had a social relationship, to surreptitiously ensure that Judge Mary Work, with whom he was also socially acquainted through his prior romantic relationship with Judge Karen Peters, would enter an Order of Protection against the petitioner and a second order depriving Dr. Maliha of access to weapons he had purchased or inherited from his father.

In so intervening, Faluotico again baselessly exaggerated petitioner's dangerousness and made other highly disparaging comments about Dr. Maliha.

Dismissal of Criminal Charge against Petitioner

On September 17, 2002, the criminal charge against petitioner was dismissed in petitioner's favor and no court ever found him guilty beyond a reasonable doubt of any CRIMINAL charge based on the June 19, 2002 incident.

REASONS FOR GRANTING CERTIORARI

A. FALUOTICO'S SUBJECTIVE INTENT IS RELEVANT, NOT IRRELEVANT, TO THE FALSE ARREST CLAIM

This Court has repeatedly held that where police have an objectively reasonable to engage in a particular law enforcement function, their subjective intent is constitutionally irrelevant. *Brigham City, Utah v. Stewart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (holding that whether police officers were subjectively motivated by a desire to bring order to a tumultuous situation inside a home or a desire to save homes and property was irrelevant as either justified the police action); *Whren and Brown v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (since police had probable cause to make traffic stop, their subjective intent, i.e., whether they actually made the stop because they suspected drugs were in the vehicle, was constitutionally irrelevant).

However, in these cases and its other precedent, this Court has not passed on whether a hostile and personal motive by the arresting officer, one unrelated to proper law enforcement objectives, can defeat the constitutionality of an arrest which is itself objectively dubious. This is such a case.

Here, the issue of "subjective intent" is not raised in the context of choosing between two legitimate bases for law enforcement action as in the cited precedents. Rather, here, Faluotico has "created" or "manufactured" arguable probable cause for petitioner's arrest to carry forward a personal vendetta. His rhetoric obscured, indeed overwhelmed, the absence of objective probable cause or, put another way, intentionally created the semblance of objective probable cause, triggering Maliha's arrest. Examining Faluotico's bad faith is relevant to demonstrating how and why he concocted "probable cause" for this arrest. On such facts, the district court and Court of Appeals erred in dismissing as irrelevant Faluotico's personal animus. As Faluotico made the case for arrest by embellishments of his own making, not the incident as Sara Maliha initially reported it, any analysis which rejects entirely his subjective intent condones the personalization of the law enforcement function.

This Court did not address such issues in the cited precedent or in any other case which re-stated the "objective" basis for probable cause and rejected any focus on "subjective intent".

In adjudicating a claim for false arrest, the arresting officer's subjective intent may be deemed a relevant factor. If that officer, as here, manipulates a "non-victim" into signing a supporting deposition out of *his or her own* hostility toward the arrestee, this should be relevant in assessing a claim for false arrest. This is so precisely because the allegedly objective basis of the arrest is more likely fabricated with the assistance of an arresting officer acting with this hostile personal motivation.

To hold otherwise, as did both the district court and the Court of Appeals, condones highly improper police practice on a basis which that practice itself has materialized. This tautology permits the police too much latitude and insulates from suit a police officer, like Faluotico, who orchestrate false arrest by creating the allegedly objective predicate out of his own hostility. There is simply no precedent of this Court which brooks such condonation of blatant police misconduct.

B. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED AND AFFIRMED CONTRARY TO THIS COURT'S PRECEDENTS

The Second Circuit has affirmed summary judgment where material issues of disputed facts compel the opposite result. This ruling effectively ignores the plain language of F.R.Civ.P. 56 and this Court's longstanding authority and teaching. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Simply stated, neither district courts nor the Courts of Appeal are to intrude into the role of the fact-finder. The instant decision is a blatant violation of that cherished principle which implements the right to a jury trial and sets a plain limit upon the appropriate fact-finding role of the district court deciding a Rule 56 motion.

Here, a reasonable jury could have decided that [a] Dr. Maliha did not harass, assault or batter his wife; [b] Mrs. Maliha truthfully recounted this to the first deputy sheriff who responded to the Liffman home; [c] with Liffman and Faluotico's

encouragement, Mrs. Maliha changed her story when she perceived an opportunity to gain advantage in her planned matrimonial; [d] Faluotico was aware of the change in account and the baselessness of lodging criminal charges against Dr. Maliha in that light; [e] despite this knowledge, out of his own hatred for Dr. Maliha and without having even seen Mrs. Maliha, Faluotico lobbied intensely for petitioner's arrest; [f] this action was informed not by a proper basis for an arrest, but, rather, by the venomous personal hostility Faluotico had toward Dr. Maliha.

Since the record construed most favorably to the non-moving party easily supports each of these propositions and since these propositions would satisfy the elements of false arrest, the Court of Appeals erred when it affirmed the grant of summary judgment to both Faluotico and Mrs. Maliha.

By continuing to decide contested issues of fact, the district courts and Courts of Appeal effectively deprive litigants, including petitioner, of their right to a jury trial before their peers. To correct this substantial and repeated error, the Supreme Court should grant petitioner's request for a writ of certiorari.

CONCLUSION

THE DECISION OF THE COURT OF APPEALS FAILS TO RECOGNIZE THAT FALUOTICO'S "SUBJECTIVE INTENT" INFLUENCED THE PRESENTATION OF THE ALLEGEDLY "OBJECTIVE EVIDENCE" WHICH PREDICATED PETITIONER'S ARREST. AS THE SEPARATION BETWEEN OBJECTIVE EVIDENCE AND SUBJECTIVE INTENT IS CLOUDED, THE FINDER OF FACT WAS ENTITLED TO CONSIDER FALUOTICO'S SUBJECTIVE INTENT IN DETERMINING WHETHER PETITIONER WAS SUBJECTED TO FALSE ARREST. FOR THIS REASON, THE GRANT OF SUMMARY JUDGMENT AND ITS AFFIRMANCE WERE WRONGFUL AND SHOULD BE REVERSED.

Dated: October 28, 2008

Respectfully submitted,

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